80-1098

Supreme Court, U. S.
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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1980

BROMLEY CORPORATION, DOING BUSINESS AS ROBERTS AIRWAYS, AND MUSTANG AVIATION, INC.
Petitioners,

v.

LINDA CORTESE, ADMINISTRATOR OF THE ESTATE OF KENNETH DOMINICK CORTESE, DECEASED; AND INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF ERIC CORTESE, AS HEIRS OF KENNETH DOMINICK CORTESE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE FEDERAL RULES OF EVIDENCE PERMIT THE INTRODUCTION OF "YARDSTICK" OR "COMPARABLE MODEL" EVIDENCE OF THE NATURE UTILIZED BY THE PLAINTIFFS BELOW IN WRONGFUL DEATH CASES ON ISSUE OF LOSS OF FUTURE EARNINGS AND SUPPORT.

2. WHETHER THE ILLEGAL TRANSPORTATION OF NARCOTICS AND CONTROLLED SUBSTANCES BY PASSENGERS, UNKNOWN TO A COMMON CARRIER, WILL RENDER A CONTRACT OF CARRIAGE VOID AND UNENFORCEABLE BY THOSE PASSENGERS.

3. WHETHER THE FEDERAL RULES OF EVIDENCE PERMIT THE INTRODUCTION OF EVIDENCE OF INSTANCES OF PRIOR PILOT MISCONDUCT TO PROVE PILOT NEGLIGENCE.

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No. .....

In The

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OCTOBER TERM, 1980

BROMLEY CORPORATION, DOING BUSINESS AS ROBERTS AIRWAYS, AND MUSTANG AVIATION, INC.,

Petitioners,

v.

LINDA CORTESE, ADMINISTRATOR OF THE ESTATE OF KENNETH DOMINICK CORTESE, DECEASED; AND INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF ERIC CORTESE, AS HEIRS OF KENNETH DOMINICK CORTESE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners Bromley Corporation, doing business as Roberts Airways, and Mustang Aviation, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 14, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the District Court for the Northern District of Texas and the jury verdict also appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1980. A timely petition for rehearing en banc was denied on October 14, 1980, and this petition for certiorari

was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence 401, 402, 403:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the Plaintiffs being citizens of Minnesota, and Defendants citizens of Texas, and the requisite amount in controversy exceeding $10,000.

On September 20, 1973, a Beech Model 18 aircraft carrying the Jim Croce musical group crashed during nighttime takeoff from the Municipal Airport at Natchitoches,

Louisiana. As a result of the crash, six people, including Kenneth Dominick Cortese, were killed. After the crash, a large amount of controlled and prohibited drugs and other substances such as marijuana were found among the luggage and on the persons of various members of the musical group.

Three separate trials have occurred concerning liability for the wrongful death of Kenneth Cortese. The first trial involved an adjudication of the vicarious liability of Mustang Aviation, Inc. for the acts and omissions of Bromley Corporation, d/b/a Roberts Airways and its pilot, Robert Elliott. The second trial in August of 1977 involved a determination of liability issues relating to both Defendants *vis a vis* the Plaintiffs. Evidence was introduced in an attempt to establish the negligence of the pilot of the aircraft, Robert Elliott, and that such negligence proximately caused the crash.

Following the liability trial of August 1977, all claims were settled with the exception of that of Kenneth Dominick Cortese which was tried to a jury with respect to damages only in March, 1978. During this trial testimony was admitted, over the objections of the Defendants, in the form of "yardstick" or "comparable model" evidence in an effort to show the loss of future support of Kenneth Dominick Cortese. This petition is an appeal of all phases of the trial of this case insofar as they respect the claims of Kenneth Dominick Cortese.

REASONS THE WRIT SHOULD BE GRANTED

I.

IMPORTANCE OF QUESTIONS PRESENTED

A. NO UNIFORM EVIDENTIARY RULE EXISTS REGARDING THE ADMISSIBILITY OF "YARDSTICK" OR "COMPARABLE MODEL" TESTIMONY RELATIVE TO DAMAGES FOR LOSS OF FUTURE EARNINGS IN WRONGFUL DEATH CASES.

This petition presents a question of utmost importance in the majority of wrongful death cases tried in federal courts, namely, what evidentiary rules and guidelines are to be utilized in determining the admissibility of so-called "yardstick" or "comparable model" testimony on the issue of damages relating to loss of future earnings of the deceased. In many such cases, such as this one, such evidence may be highly speculative and conjectural, thereby leading to an award far above the limits of reason. This Court has not addressed this important issue and the present case presents an appropriate vehicle for such an opinion.

The Court of Appeals affirmed the Trial Court's admission of testimony by Alan Neuman and Dr. Charles Linke as to the deceased's loss of future earnings. Although Neuman's testimony was admitted as a "yardstick" to aid the jury in awarding lost future earnings, it is undisputed that Neuman's financial success following Kenneth Cortese's death was due specifically to his unique ability to raise $15,000, to his personal opportunity to invest in a concert tour business and, through his own talent and hard work, to ultimately become an officer in that new corporation. Dr. Linke, Respondents' economic expert, testified as to the deceased's loss of earnings based on projections from a hypothetical peer group of white males living in Minneapolis, Minnesota. None of Dr. Linke's projections included the actual earnings history of Kenneth Cortese. By use of the "peer group" projections, Dr. Linke was allowed to establish earnings of the average peer group members which exceeded the actual earnings history of the deceased by a ratio of four to one in 1969, two to one in 1970, three to one in 1971, and three to one in 1972.

Federal Rules of Evidence 401, 402 and 403 dictate that such evidence of the types cited above be admitted only if

relevant and if its probative value outweighs the prejudicial effect the testimony may have in confusing or misleading the jury. Since the evidence permitted the jury to apportion damage on the basis of speculative and conjectural projections, it is clear that such evidence was inadmissible under the test of Rule 403 and that it was an abuse of discretion to admit it.

The history leading up to the adoption of Rule 403 and the developing case law since its enactment reflect the intention of the drafters to prohibit the rendition of jury verdicts on the shifting foundation of speculation and conjecture, and to preclude the admission of evidence where confusion would result. Notes of Advisory Committee on Proposed Rules, Federal Rules of Evidence 403 (1975); *U. S. v. Ravich*, 421 F.2d 1196 (2nd Cir. 1970) cert. den. 400 U.S. 823, *U. S. v. Stoehr*, 100 F. Supp. 143 (D.C.Pa. 1951), aff'd 196 F.2d 276, cert. den. 344 U.S. 826; *U. S. v. Castell*, 584 F.2d 87 (3rd Cir. 1978) cert. den. 99 S.Ct. 1256.

There is a crying need for this Court to delineate the scope of Rule 403. Specifically, the Court should determine the limits of the admissibility of "yardstick" or "comparable model" evidence as governed by Rule 403, where the evidence is highly speculative and conjectural in nature. The far-reaching importance of such a decision is clear — increasing numbers of wrongful death claims rely on the use of yardstick testimony pertaining to comparable employees of the deceased to establish damages in the form of loss of future earnings. Clearly defined standards from this Court regarding the nature and extent of speculation and conjecture that will be allowed in determining the admissibility of such evidence will clarify the application and use of the Federal Rules of Evidence in determining damage issues in wrongful death cases.

II.

CONFLICT OF DECISIONS

A. THE ILLEGAL POSSESSION AND TRANSPORTATION OF NARCOTICS AND OTHER PROHIBITED DRUGS BY THE DECEASED RENDERED THE CONTRACT OF CARRIAGE VOID.

A common carrier generally owes the duty to exercise a high degree of care to all of its passengers. *City of Dallas v. Jackson*, 450 S.W.2d 62, 63 (Tex. 1970). However, the duty continues only so long as the individual remains a passenger pursuant to a valid contract of carriage. *Block v. Compaignie Nationale Air France*, 386 F.2d 323 (4th Cir. 1967), cert. den. 392 U.S. 905.

Inasmuch as the decedent, along with other members of the rock band with which he was traveling, were transporting narcotics and controlled substances illegally, decedent's status as a passenger on the plane was vitiated as a matter of law. The contract of carriage was rendered void and unenforceable as the sole result of decedent's actions in attempting to transport illegal drugs in direct contravention of the laws, regulations, and public policies of both the states of Texas and Louisiana, and of the United States. 21 U.S.C. 841, et seq., Art. 4476-15, Vernon's Annotated Texas Criminal Statutes, Texas Controlled Substances Act, §§ 4.02-4.05, Louisiana Statutes Annotated — R.S.40:-961, Uniform Controlled Dangerous Substances Law. The decedent's status as a passenger ceased, as did the duty owed to him by the carrier, when he entered the aircraft carrying illegal drugs. Specifically, the decedent became no more than a licensee, obligating the carrier to afford him only *ordinary* care as opposed to a high degree of care while on the aircraft. In light of the jury's finding that the failure of the pilot to exercise ordinary care during the

flight was *not* a proximate cause of the crash resulting in decedent's death, the Petitioners are entitled to judgment in their favor.

The persistence of the Trial Court and the Court of Appeals in holding Petitioners to the standard of a common carrier, i.e., the duty to provide a high degree of care to decedent as a passenger creates unavoidable conflicts not only with other decisions emanating from the Fifth Circuit, but also with decisions from other courts of appeals. The Fifth Circuit has previously determined that where a contract is rendered void due to illegal activity by one or more of the parties, the entire contract is unenforceable in either state or federal courts. *McLean v. York Oil Field Supply Co.*, 138 F.2d 804 (5th Cir. 1943). The lower court decision similarly conflicts with the decision of the Second Circuit Court of Appeals in affirming *Williams v. Transworld Airlines, Inc.*, 369 F.Supp. 797, 805, 806 (S.D.N.Y. 1974), aff'd, 509 F.2d 942 (2nd Cir. 1975). In *Williams* it was held that an airline passenger, or any other type of passenger, loses his status as a passenger when his conduct exceeds the intended scope of the contract of carriage. The conflict created by the Court of Appeals decision in the present case is of sufficient magnitude to require consideration and guidance by this Court to define the duty owed by a common carrier to a passenger where the contract of carriage is invalidated by the passenger's illegal conduct.

B. THE ADMISSION OF EVIDENCE OF PAST INSTANCES OF PILOT MISCONDUCT WAS IMPROPER.

The long standing general rule in the federal courts declares that evidence of prior instances of negligent misconduct by a defendant are inadmissible in a negligence case

for the purpose of proving that a defendant acted in conformity therewith on a particular occasion. Such evidence is excluded based on the experienced view of the federal judiciary that such evidence is of slight probative value yet extremely prejudicial. Federal Rules of Evidence 404; *Reyes v. Missouri Pacific Railroad Company*, 589 F.2d 791 (5th Cir. 1979). While evidence of prior negligent conduct may, in some instances, be admissible under one of the exceptions to Rule 404, such evidence must be carefully examined before being received to the end that circumstances of prior incidents bear a substantial similarity to circumstances surrounding the incident which is the subject matter on trial. *Julander v. Ford Motor Company*, 488 F.2d 839 (10th Cir. 1973).

The Fifth Circuit affirmed the actions of the Trial Court in admitting, over Petitioners' objections, evidence of specific instances of prior negligent conduct by the pilot of the aircraft. In so doing the Court approved the use of evidence relating to events which were extremely remote in time from the alleged negligent acts being tried. The prior instances of negligence admitted into evidence related to activities of the pilot in 1962, 1965 and 1969, thus having no logical or probative value to events occurring in 1973. Similarly there was no showing that the prior negligent acts by the pilot occurred under the same or substantially similar circumstances as the crash in question. While the probative value of such evidence is nonexistent, the accompanying degree of prejudice to Petitioners is extremely high, allowing the jury to arrive at its verdict on the basis of irrelevant evidence.

In electing to affirm the action of the Trial Court in allowing such evidence, the Fifth Circuit has proceeded in a manner directly in conflict with decisions from its sister

circuits which hold that evidence of prior negligent misconduct of a defendant in a negligence case is inadmissible. *Baldwin v. Hill*, 315 F.2d 738 (6th Cir. 1963); *Julander v. Ford Motor Company*, supra. Further conflict is apparent in that the Fifth Circuit affirmed the use of such evidence in the absence of the required showing by Respondents that the circumstances of the pilot's prior acts were similar or even substantially similar to the crash which was the subject of the present suit. *Julander*, supra. Guidance from this Court is essential to evaluate and clarify the rules and case law governing the use of such evidence in negligence cases.

All of the testimony of Dr. Gibbons, Respondents' expert, to show pilot negligence was based upon his conclusion that the pilot took off into a "black hole" and suffered spatial disorientation, which caused the crash. The Court admitted such prejudicial testimony of prior conduct after the testimony of Milton J. Johnson, the Petitioners' expert. It was necessary to introduce the testimony of Mr. Johnson in order to refute Dr. Gibbons' expert testimony, because the only way available to the Petitioners to show that Robert Elliott did not suffer spatial disorientation by flying into a "black hole" was to show his experience and the fact that he had hundred of hours in instrument flying. The Trial Court's excuse for the admission of such testimony was wholly unjustified.

CONCLUSION

Certiorari should issue when (1) important federal questions are unsettled; (2) a conflict exists between the decisions of the various Courts of Appeals. This Petition presents this Honorable Court with both situations. For these reasons, a writ of certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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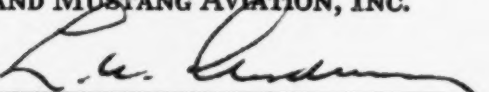
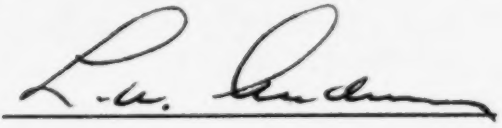
By 
L. W. Anderson
Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following attorneys of record on this the 31 day of December, 1980: Mr. Thomas A. Demetrio, 33 North Dearborn, Suite 1230, Chicago, Illinois 60602; and Mr. Tom H. Davis, 707 West 34th Street, Post Office Box 4917, Austin, Texas 78765.



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-74-843-G
(Consolidated W/Civil Action No. CA3-75-0823-G)

INGRID CROCE, Administratrix of the Estate of
JAMES JOSEPH CROCE, also known as
JIM CROCE, deceased; and individually and as Mother,
Natural Guardian and Next Friend of
ADRIAN CROCE, Minor, Heirs of
JAMES JOSEPH CROCE; ET AL

v.

BROMLEY CORPORATION, d/b/a
ROBERTS AIRWAYS, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came on to be heard the above-entitled cause for trial on the limited issue of defendant, Mustang Aviation, Inc.'s liability, and the parties having presented their evidence, filed their briefs and argued their case, the court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. (a) None of the plaintiffs or their decedents are or at the time of the crash were residents of the State of Texas. Defendant, Mustang Aviation, Inc., ("Mustang") is a corporation organized under the laws of the State of Texas, with its principal place of business and corporate citizenship in the State of Texas. Defendant, Bromley Corporation, doing business as Roberts Airways, ("Roberts") is organized under the laws of the State of Texas, with its principal place

of business and corporate citizenship in the State of Texas. "Croce Group" means James Joseph Croce, the decedent, and those persons accompanying him on the flight resulting in their death.

(b) The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

2. On September 18, 1973, Lloyd St. Martin was acting as an agent for the Croce Group, and Bill Breedlove was director of operations and chief pilot for Mustang. As agent for the Croce Group, Lloyd St. Martin entered into an oral contract with Bill Breedlove, as agent for Mustang, whereby Mustang was to fly the Croce Group from Shawnee, Oklahoma, to Columbus, Mississippi, to Natchitoches, Louisiana, and to Dallas, Texas, spending one night each in Columbus and in Natchitoches. On September 19, 1973, pursuant to this agreement, Lloyd St. Martin wired $952.63, cash to Mustang's bank account in Dallas for deposit. The $952.63 was payment in advance for Mustang's services.

3. Mustang had, when St. Martin and Breedlove reached the agreement, intended to use its Cessna 401 aircraft to fulfill the agreement, but the Cessna was grounded that afternoon for repairs. Mustang upon learning of the grounding of the Cessna asked Roberts to make the flight, which Roberts agreed to do. Mustang gave to Roberts all the flight information it received from Lloyd St. Martin and paid Roberts $552.35 for the flight.

4. a. An agent for the Croce Group, made a telephone call from Shawnee, Oklahoma, to Mustang, at Dallas, Texas, at 7:45 a.m. on September 19, 1973. Richard C. Linden, acting as agent for Mustang, answered the call and informed the Croce agent that the aircraft would be a twin-engine Beech aircraft, instead of a Cessna 401, but there is no credible evidence that Richard C. Linden informed the Croce agent that Roberts was the owner and operator of the substitute aircraft or that Roberts was solely responsible for the flight, nor did anyone secure the Croce Group's agreement to the change from the original contract. While the evidence on this point is sparse the reasonable inferences from the evi-

dence left the court with the firm belief that no such communication occurred.

Alternatively, having assumed a contractual obligation to ferry the Croce Group and having taken payment in advance (a substantial portion of which it retained), Mustang had the burden of proving that it had informed the Croce Group of the substitution, which burden it has failed to sustain.

b. Under all the facts and circumstances, Mustang led the Croce Group to believe that the flight was in a Mustang aircraft piloted by a Mustang representative.

5. Robert Elliot, the pilot of the flight that crashed, was an employee of Roberts Airways at the time of the crash.

6. John Roberts had a telephone conversation with Robert Elliot on September 20, 1973, and was advised for the first time that there had been a change in the flight plan; that instead of proceeding from Natchitoches, Louisiana, to Dallas, Texas, they were going to fly to Sherman, Texas, and then to Dallas. John Roberts did not advise Mustang of this change in the flight plan.

7. Lloyd St. Martin was not aware that Roberts was flying for Mustang until after the crash, and no one else in the Croce Group knew or should have known that Mustang was not responsible for the flight or that Roberts was flying it in Mustang's place.

8. Plaintiffs failed to prove that Mustang had control over Roberts, other than as to the ultimate result that the Croce Group be provided aircraft transportation as requested.

9. Plaintiffs failed to prove that there was a mutual right of control as between Mustang and Roberts, that there was a sharing of profits (except for the division between Mustang and Roberts of the $952.63) and Roberts did not know what fee had been agreed upon between Mustang and Lloyd St. Martin.

10. Roberts Airways' twin-engine Beech aircraft crashed on takeoff from Natchitoches, Louisiana, en route to Sherman, Texas.

11. The court finds all facts set out in the stipulation filed herein.

CONCLUSIONS OF LAW

1. This court has jurisdiction under Title 28 §1332.

2. This court will apply Texas conflicts laws.

(a) At the time of the accident and filing of suit, the Texas Wrongful Death Act did not have extraterritorial effect.

(b) The Louisiana Wrongful Death Act as it existed at the time of the accident and filing of suit is applicable.

(c) The court, in the absence of suggestion by the parties to the contrary has looked to Texas law to resolve the agency and joint venture questions presented by the relationship between the defendants Bromley Corporation, doing business as Roberts Airways, ("Roberts") and Mustang Aviation, Inc. ("Mustang").

3. Mustang incurred no liability for the deaths under the rules of respondent superior because Mustang had no right of control over Roberts.

4. The plaintiffs' theory of "Vicarious Liability", whereby Mustang would be liable for the negligence of an independent contractor, has not been accepted in Louisiana or Texas. Mustang is not liable under this principle.

5. Mustang and Roberts were not at the time of the crash engaged in a joint venture because there was, in fact, no mutual right of control nor was there any profit sharing or mutual ownership.

6. (a) Mustang is estopped to deny agency because Mustang led the Croce Group to believe that Robert Elliot, the pilot, was Mustang's agent, flying Mustang's airplane.

(b) The Croce Group reasonably relied, to its detriment, on Mustang's implied promise that Mustang would fly the charter flight.

7. Alternatively, Mustang is liable as the agent of an undisclosed principal.

SIGNED and ENTERED this 19th day of October, 1976.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INGRID CROCE, Administratrix of the Estate of
JAMES JOSEPH CROCE, also known as
JIM CROCE, Deceased; and individually and as
Mother, Natural Guardian and Next Friend of
ADRIAN CROCE, Minor, Heirs of
JAMES JOSEPH CROCE, ET AL,
PLANTIFFS,
VS.
BROMLEY CORPORATION, d/b/a
ROBERTS AIRWAYS, ET AL
DEFENDANTS.

CIVIL ACTION NO. CA-3-74-843-G
(Consolidated With Civil Action No. CA-3-75-0823-G)

MEMORANDUM AND ORDER

All parties have requested that this court enter an Order based upon the Findings of Fact and Conclusions of Law filed October 28, 1976 (Findings and Conclusions) and containing a certificate under Title 28 U.S.C. §1292(b). Defendant Bromley Corporation (Mustang) has also attacked the conclusion of the Findings and Conclusions that Mustang shares with Roberts any liability for the fatal aircraft crash.

I.

MUSTANG'S QUARREL WITH THE COURT'S CONCLUSION

Mustang makes two central arguments. First, Mustang argues that there is no evidence that the Croce group was not told that Roberts, not Mustang, was to fly the charter; that the burden of proving estoppel being upon the party asserting it, here the Croce group, there can be no agency by estoppel. Mustang also makes a new argument, new in the sense that it was not made before and new in the sense that it relies upon facts not proved, that Roberts did not follow the terms of the charter Mustang contracted for.

a. The Burden of Proof: Mustang misconceives the court's ruling. There was evidence of a custom or practice of Mustang and Roberts not to disclose a substitution of Roberts for Mustang in situations where Mustang was not able to perform a contracted for charter. Mustang booked the Croce charter and retained a substantial portion of the charter fee. One naturally inquires why the fee arrangement existed and why there was a habit and practice of such nondisclosure. The answers are common sense deductions from the evidence. Mustang enjoys enhancement of custom by being able to furnish the requested charter service. That is, Mustang avoids having to disclose to a prospective customer that it is not equipped to deliver. It thereby enjoys greater chance of future business. The ability of Mustang to retain a substantial portion of the fee is reflective of its greater ability (than Roberts) to attract business stemming in no small part from its greater size. One inference is that Mustang has a sufficient edge over Roberts to command such a healthy (as a percentage of the total) referral fee. The Croce group contracted with Mustang thereby expressing in concrete terms their confidence both in Mustang's flying ability and presumably its financial responsibility.

Significantly, there is evidence that *Mustang* did not disclose the substitution of the smaller charter service, Roberts, and that evidence should be viewed against the background of a practice and custom of nondisclosure of such substitutions.

There are at least two difficulties with Mustang's burden of proof argument. The first is the presence of evidence of Mustang's nondisclosure. Second, Mustang proceeds upon the assumption that it had no duty to speak. In other words, Mustang argues that the deceased pilot may have told the deceased passengers or the unfortunate passengers may have otherwise learned that there had been a substitution of charter services; that the Croce burden was in any event to adduce proof to negate that possibility. Wholly apart from the direct evidence of nondisclosure, which in this court's view would directly meet the burden of proof argument, if arguendo apposite, Mustang fails to grasp the point that an

estoppel can arise from a breach of a duty to speak (See Finding 4a). As stated by the Supreme Court of Texas in *Burnett v. Atteberry*, 105 Tex. 119, 145 S.W. 582 (1912):

> "An estoppel may arise as effectually from silence, where it is a duty to speak, as from words spoken. One may be induced to act to his injury on account of the silence of one interested in a transaction, and when such course of action is permitted with a knowledge of the interested party or induced by silence or tacit acquiescence, the doctrine of estoppel may be invoked. The rule is tersely but accurately stated by Mr. Bigelow in the following sentence: 'A representation in the nature of a negative of one's rights may, as we have seen, arise from pure silence; and from pure but *misleading* silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise . . .' [Emphasis the courts] . . . 'A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in decieving'." Id. *Burnett v. Atteberry*, 145 S.W. 587 (1912).

Mustang was under a duty to speak. Mustang did not. The burden of avoidance of this breach of duty by proof that the Croce group learned from sources other than Mustang of the substitution can hardly be placed upon the Croce group.

b. *The Material Variance and Scope of "Agency"*: Mustang argues that Roberts altered the charter contract by not flying from Natchitoches, Louisiana direct to Dallas, Texas but to Sherman, Texas, a city located approximately 50 miles from Dallas. The force of this argument is not clear. Presumably, the argument is that if Roberts was an agent of Mustang, Roberts exceeded the scope of the agency. The claimed changes in the charter contract include the addition of two passengers, a change of destination from Natchitoches, Louisiana to Sherman, Texas from the plan of Natchitoches, Louisiana to Dallas, Texas and night as distinguished from day flight. The argument has two central flaws. The material-

ity of such changes is not supported by facts and requires an erroneously narrow view of the scope of Roberts' authority to act. There is no evidence that the contract of charter was *limited* precisely to any number of passengers. Presumably, the nature of the aircraft itself would set the reasonable number of passengers to be loaded. Nor is there evidence that night flight was prohibited. The Findings of Fact and the exhibits describing the flight do refer to "RON" for "rest over night", but those terms were used solely to indicate the approximate total charter time and were not perceived by the court to be nor was there any evidence of probative and convincing value that flight at night was not contemplated or was forbidden. In any event, none of these facts were material. While the court has earlier made no findings with regard to the materiality of such facts or the scope of agency because no argument was adressed to these points, the court now does so. The fatal crash occurred on takeoff from Natchitoches, Louisiana while in route to Sherman, Texas. The same take-off would have been required whether the destination was Dallas or Sherman, Texas. And as otherwise noted, there is no evidence that some flight time would not be at night. Alternatively, *Mustang* simply failed to prove the materiality of any such claimed changes in the charter. Such lack of proof is understandable for several reasons, not the least of which is that such was simply not the focus of the trial earlier had.

More importantly, the estoppel found by the court was the inducement by Mustang of the Croce group to believe that they were dealing with Mustang. Having enjoyed the benefits of this silent substitution, Mustang's argument, proceeding as it does upon a narrow view of Roberts' authority is without force. Mustang led the Croce people to believe that Croce was dealing with Mustang. Even if there were material changes in the contract of charter, they were negotiated with an entity Mustang is estopped to deny is other than Mustang.

II.

THE 1292(b) CERTIFICATE

There is strong justification for the judicial intolerance of piecemeal appellate review. The statutory exception allows review only when that justification is countervailed by an otherwise non-appealable order which "... involves a controlling question of law as to which there is substantial ground for difference of opinion ... [where] ... an immediate appeal from the order may materially advance the ultimate termination of the litigation."

It is urged that resolution of the issues before the court could only advance the ultimate termination of the case, because the presence of Mustang in the suit effects [sic] pending settlement negotiations. It could be argued that advancement of termination in this context must be read in a holistic manner. That is, the inclusion or exclusion of Mustang adds or subtracts more than one defendant in terms of the dynamics of settlement. It would be naive to assume that the additional force of potential funds is not significant. The argument continues that since most civil cases are terminated by settlement, "termination" as used in 1292(b) must include those situations where the assured presence of a defendant will affect settlement. Otherwise stated, a 1292(b) standard must be administered in a realistic and pragmatic way. The difficulty with this argument is that it fails to provide a workable standard for review in a situation where the precise command of the statute is to do just that. Moreover, the application of this standard would literally contemplate 1292(b) certification of orders denying dismissal of a defendant in most multi-party cases. It is not necessary to wrestle to conclusion with this portion of the 1292(b) standard; another vital element of the standard is here absent. It is only the resolution of a question of *law* which is reviewable. The question before the court is essentially one of fact.

The court is sensitive to the wishes of all parties to obtain appellate review of the issues here tried; and this court is

friendly to an idea presenting even a fair chance of avoiding a time consuming trial on the merits. Indeed, the court initially advised counsel that it would provide the requisite certificate. Reflection upon the statutory standard leads to the conclusion that neither the parties nor the court's private hopes can be realized.

This case is set for trial on the merits before a jury in July of 1977.

III.

LEAVE TO AMEND

Leave to file Plaintiff's Second Amended Complaint is granted.

DATED this 3rd day February, 1977.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
No. CA3-74-843-G

INGRID CROCE, Administratrix of the Estate of JAMES JOSEPH CROCE, also known as JIM CROCE, Deceased; and individually and as Mother, Natural Guardian and Next Friend of ADRIAN CROCE, Minor, Heirs of JAMES JOSEPH CROCE;

MAURICE J. MUEHLEISEN, Administrator of the Estate of MAURICE T. MUEHLEISEN, Deceased, Individually and Next Friend of MICHAEL MUEHLEISEN and ROBERT MUEHLEISEN; and MARGARET MUEHLEISEN, JOSEPH T. MUEHLEISEN, THOMAS R. MUEHLEISEN, MARGARET ANN SPAIR, MARY ELIZABETH BOWAK and ANN MARIE MUEHLEISEN, as Heirs of MAURICE T. MUEHLEISEN;

ESTELLE RAST and ADOLPH RAST, Individually and as Surviving Next of Kin and Heirs of DENNIS RAST, Also Known as MORGAN TELL, Deceased;

ERNESTINE S. STEVENS, Administratrix of the Estate of GEORGE A. STEVENS, III, Deceased; ERNESTINE STEVENS, Individually and as Next Friend of KIMBERLEY STEVENS, A Minor, as Heirs of GEORGE A. STEVENS, III;

LINDA CORTESE, Administratrix of the Estate of KENNETH DOMINICK CORTESE, Deceased; and Individually and as Mother and Natural Guardian of ERIC CORTESE, as Heirs of KENNETH DOMINICK CORTESE;

PLAINTIFFS

VS.

BROMLEY CORPORATION, Doing Business as ROBERTS AIRWAYS, and MUSTANG AVIATION, INC.

DEFENDANTS.

ORDER

Beginning on August 22, 1977, came on to be heard the above entitled cause for jury trial on the issue of the

liability of Mustang Aviation, Inc. and Roberts Airways, and the parties having presented their evidence, filed their briefs and argued their case, the Court hereby holds that as a matter of law Mustang Aviation, Inc. and Roberts Airways were common carriers who owed plaintiffs' decedents the highest standard of care.

Therefore, in accordance with the jury's verdict, it is ORDERED, ADJUDGED AND DECREED that Mustang Aviation, Inc. and Roberts Airways are jointly and severally liable to plaintiffs for their damages.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0823-G

LINDA CORTESE, Administrator of the Estate of
KENNETH DOMINICK CORTESE, Deceased;
and Individually and as Mother and Natural Guardian of
ERIC CORTESE, as Heir of
KENNETH DOMINICK CORTESE

v.

BROMLEY CORPORATION, doing business as
ROBERT AIRWAYS, and MUSTANG AVIATION, INC.

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument of counsel, it is my duty to give you the court's instructions as to the law that is applicable to this case. In arriving at your verdict, and in your deliberations, it is your duty to follow these instructions and to apply the rules of law here given to you and to find the facts of this case from the evidence introduced at the trial and in accordance with these rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Do not speculate on matters which are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict.

You are not bound by any opinion which you might think the court has concerning the facts in this case, and if I have

in any way said or done anything which leads you to believe that I have any opinions about the facts in this case, you are here instructed to disregard them. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you any intimation as to what verdict I think you should find.

You are instructed that the statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the position and contentions of the parties to this suit. The jury should not consider or be influenced by the fact that during the trial of this case, counsel have made objections to the testimony, as it is their duty to do so, and it is the duty of the court to rule on them in accordance with the law.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given his testimony. In weighing the testimony of a witness, you should give that testimony careful scrutiny. Consider all of the circumstances under which the witness testified, his appearance and demeanor while on the witness stand, his apparent candor and fairness, or the lack thereof, the reasonableness or unreasonableness of his testimony, the interest, if any, he has in the outcome of the case, and the extent to which he is contradicted or supported by other credible evidence. You will rely on your own good judgment and common sense in considering the evidence and determining the weight to be given it.

This means that on each of these questions the party with the burden of proof must prove its contentions by what is called a "preponderance of the evidence". The fair preponderance of the evidence does not necessarily mean the greater number of witnesses, but means the greater weight of the evidence taken altogether.

"Preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, which is more convincing and produces in your mind the belief that what is sought to be proved is more likely true

than not true. In determining whether any fact in issue has been proven by a preponderance of the evidence, you should consider the testimony of all witnesses and all exhibits received in evidence, regardless of who may have introduced them. Preponderance of the evidence does not require proof to an absolute certainty, because such a degree of proof is seldom possible.

The testimony of a single witness, which produces in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have testified to the contrary, if you believe this witness and have considered all the other evidence.

It is said by the courts that the preponderance of the evidence means the evidence of greater convincing force. It means evidence which satisfies the conscience and brings conviction to an intelligent mind.

You must weigh the evidence as though it were placed on a scale. Where, for example, the plaintiff has the burden of proof and if the scale is weighed in favor of the plaintiff, that is to say, if the plaintiff has produced evidence of greater convincing force, the plaintiff has sustained its burden of proof. If it is weighed in favor of the defendant, or if it is evenly balanced, the plaintiff has failed to sustain his burden.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in the case. One is direct evidence — such as testimony of an eyewitness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented in this case. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy,

prejudice or public opinion. All parties to this litigation, whether individual or corporation, or whatever their character must be treated exactly alike insofar as their rights are concerned. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice. You should not have any personal feelings or preferences as between individuals and corporations.

Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations, and do not speculate on matters not shown by the evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case. You will carefully and impartially consider all the evidence in the case and follow the law as stated by the court and reach a just verdict on all the issues, regardless of the consequences.

You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

The rules of evidence ordinarily do not permit witnesses to testify as to opinion or conclusion; an exception to this rule exists as to those we call "expert witnesses". These are witnesses who, by education and experience, have become expert in some art, science, profession or calling. Such witnesses may state their opinions as to relevant and material matters in which they profess to be expert and may also state their reasonableness for their opinions.

Lay persons may also express opinions as to certain matters where they have had direct observation of the events upon which they base their opinion and where the court concluded that the expression of an opinion will assist the jury. An example of such would be the speed of an automobile or the intoxication of a person.

You have heard opinion testimony in this case. It is for you to consider such testimony and give it such weight as you may think it deserves. If you should decide that such opinions are not based upon sufficient education and experience, or if you should conclude that the reasons given in support of such opinions are not sound, or if you feel that they are outweighed by other evidence, you may disregard such opinions entirely.

Plaintiffs assert that Allen Newman is a comparable employee to Kenneth Dominick Cortese which defendants deny. In weighing this evidence, you are to consider all facts and evidence in determining whether Cortese's job and skill and Newman's job and skill were comparable. If you find them comparable, you may consider the growth in earnings of Newman in deciding the question of Kenneth Cortese's income.

You should consider the fact that Newman's progress included an investment of $15,000 and whether Kenneth Cortese would have been able to make that investment and whether Cortese's progress would have been comparable to that of Newman.

Factors which should be weighed in determining the amount due for loss of support include the decedent's earnings history, his age and life expectancy, his work-life expectancy, the possibility of a decrease or increase in his earnings, the decedent's job security, the nature of decedent's work, his health, his relationship with his family, his personal expenses, and his past work record. Other factors are the surviving spouse's age and health, the minor children's age, and the effects of inflation and the need to discount future earnings to a present day amount. In short, all factors

relevant to a determination of the amount of the loss of support due to the premature demise of the decedent should be considered.

In all instances, the damages you award must be reasonable. In your verdict you may award plaintiffs only such damages as will fairly and reasonably compensate plaintiffs for the injuries or damages which you find from a preponderance of the evidence in the case, that plaintiffs have sustained as a proximate result of the accident, and limited to those items on which you have been charged. You are not permitted to award speculative damages. This means you are not to include in any verdict, compensation for prospective loss, which although possible, is remote or conjectural. At the same time, you should understand that proof to a mathematical certainty is not required. That is, you may make reasonable and just estimates, but you cannot engage in rank speculation.

You are further instructed in determining damages, if any, you must deduct from gross earnings that amount that Kenneth Cortese would have spent for his own support and needs.

SPECIAL ISSUE:

What amount of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Linda and Eric Cortese for their pecuniary loss resulting from the death of Kenneth Dominick Cortese?

In answering the question inquiring into what sum of money if now paid in cash, you should keep in mind that money in hand is more valuable than money received at a later date. Accordingly, you should apply a discount factor in accordance with the evidence in arriving at the sum to be awarded.

In connection with this question, you may consider the following elements: (a) care, maintenance, and support; (b) household services; (c) love, affection, counsel, and guidance;

and (d) sorrow, mental anguish, or grief suffered as a result of his death.

Answer in dollars and cents, if any, as to each:

Linda and Eric Cortese:

(a) care, maintenance, and support	$250,000.00
(b) household services	$ 10,000.00
(c) love, affection, counsel, and guidance	$ 20,000.00
(d) sorrow, mental anguish, or grief suffered as a result of his death	$ 20,000.00

(burden of proof on plaintiffs)

If during the course of your deliberations you wish to communicate with the court, you should do so only in writing by a written note handed to the bailiff and signed by the foreman.

You shall now retire to the jury room to deliberate upon your verdict and you may take this charge with you as well as exhibits which the court has admitted into evidence. You will select your foreman, and after you have reached your verdict, you will return this charge together with your written answers to the foregoing questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Your foreman will sign in the space provided after you have reached your verdict.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

Dated: _____

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return the same into court as our verdict.

Foreman

E-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-74-0843-G/A

LINDA CORTESE, Administrator of the Estate of
KENNETH DOMINICK CORTESE, Deceased;
and individually and as Mother and Natural Guardian of
ERIC CORTESE, as Heir of
KENNETH DOMINICK CORTESE

v.

BROMLEY CORPORATION, doing business as
ROBERT AIRWAYS, and MUSTANG AVIATION, INC.

ORDER

The court makes the following findings of fact and division of the jury's award to Linda and Eric Cortese of $300,000 plus stipulated funeral expenses of $2,921.59:

A. Linda has and will continue to suffer the loss of Kenneth Cortese's "care, maintenance, and support" for a total of 45.5 years. If these elements of damages are considered for only the work life expectancy of Kenneth, they span 34.2 years.

B. Eric, under Louisiana law, is entitled to care, maintenance, and support until age 21. It follows that from the date of his father's death to the date of his 21st birthday, he lost the care, maintenance, and support of his father for a total of 17 years. Under the law of Illinois where Eric now resides, he will reach his majority at the age of 18. That is, he will have lost the care, maintenance, and support of his father for a total of 14 years. The court will follow Louisiana law and weighing all the evidence, divides the $250,000 jury award $166,000 to Linda and $84,000 to Eric.

C. The jury awarded $10,000 without division between Linda and Eric for the loss of Kenneth's "household services." Linda would have been entitled to these services for a total of 45.5 years. The court awards the entire $10,000 to Linda.

D. Both Linda and Eric suffered the loss of Kenneth's "love, affection, counsel, and guidance" in the total amount of $20,000. Naturally, when a minor child reaches his majority, he does not lose his father's love, affection, counsel, and guidance. The court apportions $10,000 to Linda and $10,000 to Eric.

E. Lastly, the jury awarded $20,000 without division between Linda and Eric for the "sorrow, mental anguish, or grief" suffered as a result of Kenneth's death. The court apportions $10,000 to Linda and $10,000 to Eric.

F. The funeral expenses stipulated to by the parties during trial are apportioned to Linda Cortese.

IT IS SO ORDERED.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-74-0843-G/A

LINDA CORTESE, Administrator of the Estate of
KENNETH DOMINICK CORTESE, Deceased;
and individually and as Mother and Natural Guardian of
ERIC CORTESE, as Heir of
KENNETH DOMINICK CORTESE

v.

BROMLEY CORPORATION, doing business as
ROBERT AIRWAYS, and MUSTANG AVIATION, INC.

JUDGMENT

Judgment is entered on the juries' verdicts and the court's findings of fact and conclusions of law in favor of plaintiff Linda Cortese in the amount of $198,921.59 and Eric Cortese in the amount of $104,000, aggregating the sum of $302,921.59 and costs of suit with interest hereafter at the legal rate, against defendants Bromley Corporation, doing business as Robert Airways, and Mustang Aviation, Inc., jointly and severally.

It is further ORDERED that Mustang Aviation, Inc. have judgment over and against Bromley Corporation, doing business as Robert Airways, for any and all sums paid by Mustang Aviation, Inc. toward satisfaction of this judgment.

PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

CROCE v. BROMLEY CORP.

INGRID CROCE, Administratrix of the Estate of JAMES JOSEPH CROCE, etc., et al, Plaintiffs, LINDA CORTESE et al., Plaintiffs-Appellees,

v.

BROMLEY CORPORATION, doing business as ROBERTS AIRWAYS and MUSTANG AVIATION, INC., Defendants-Appellants

No. 78-2627

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

August 14, 1980

Wife and son of road manager of popular singer, who, along with his entourage, was killed in a fatal airplane crash, brought wrongful death action against the charter airline which contracted to transport group as well as the smaller charter service whose plane and pilot were substituted. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., entered judgment in favor of plaintiffs, and defendants appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) charter airline, which contracted to transport popular singer and his entourage and which failed to disclose to them the substitution of a smaller charter service and pilot, was estopped from denying that smaller charter service was its agent and liable for acts of that agent; (2) evidence adduced in wrongful death case arising from crash of charter airplane was sufficient to present jury question as to whether pilot's negligence was proximate cause of the crash; (3) charter airline was not entitled to avoid high standard of care owed to passenger merely because passenger transported small amount of marijuana in his pocket; and (4) Louisiana wrongful death statute prevented plaintiffs from recovering separate monetary awards for loss of love and affection and for sorrow and mental anguish.

Affirmed in part; reversed in part.

1. Principal and Agent — 25(1)

Mandate: Charter airline, which contracted to transport popular singer and his entourage and which failed to disclose to them the substitution of a smaller charter service and pilot, was estopped from denying that smaller charter service, whose plane crashed killing all aboard, was its agent and liable for acts of that agent.

2. Federal Civil Procedure — 2152, 2373, 2608

If there is substantial evidence opposed to motion for directed verdict, judgment n. o. v. or a new trial, i. e., evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions, motion should be denied, and case submitted to jury.

3. Aviation — 189

Evidence adduced in wrongful death case arising from crash of charter airplane was sufficient to present jury question as to whether pilot's negligence was proximate cause of the crash.

4. Federal Courts — 825

In reviewing a denial of a motion for a new trial, appellate court is bound by an "abuse of discretion" standard.

5. Carriers — 280(1.1)

Charter airline was not entitled to avoid high standard of care owed to passenger merely because passenger transported small amount of marijuana in his pocket.

6. Evidence — 560
Federal Courts — 774

Evidence of pilot's past conduct was admissible in wrongful death case arising out of fatal plane crash for limited purpose of rebutting certain opinions given by defendants' experts concerning pilot's previous deportment as a pilot;

furthermore, since defendants themselves, despite repeated warnings by trial court, placed general reputation of pilot in issue, they could not complain on appeal of trial court's error, if any, in admitting such evidence.

7. Infants — 78(1)

Minors: In wrongful death case, trial court did not err in failing to appoint a guardian ad litem for son of decedent, whose mother was also a plaintiff in the action. Fed.Rules Civ.Proc. Rule 17(c), 28 U.S.C.A.

8. Death — 67

In wrongful death case, state law did not control issue of whether evidence of decedent's future earnings was admissible. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

9. Death — 67

In wrongful death case brought under Louisiana law, evidence of decedent's future earnings was properly admitted; speculative nature of the evidence affected only the weight and not its admissibility.

10. Death — 88, 89

Louisiana wrongful death statute precluded plaintiffs from recovering separate monetary awards for loss of love and affection and for sorrow and mental anguish. LSA—C.C. Art. 2315.

11. Death — 104(6)

Trial court did not err in wrongful death case brought under Louisiana law in refusing to instruct jury, as requested by defendants, that damages would not be subject to federal income taxation.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH and GEE, Circuit Judges, and HUNTER,* District Judge.

*District Judge of the Western District of Louisiana, sitting by designation.

GEE, Circuit Judge:

On the evening of September 20, 1973, a Beech Model 18 Aircraft carrying singer Jim Croce and his entourage (the "Jim Croce Group" or the "group") crashed shortly after takeoff from the Natchitoches, Louisiana, airport. Among those killed was Croce's road manager, Kenneth Dominick Cortese, whose wife and son are the plaintiffs in this wrongful death action.[1]

Initially, we recite only the most pertinent facts; other relevant ones are detailed in our discussion below of the numerous legal issues. On September 18, 1973, Bill Breedlove, the Director of Operations of Mustang Aviation, Inc. ("Mustang"), entered into an agreement with Lloyd St. Martin of Variety Artists International, Inc. ("Variety Artists"), a booking agency for popular singers, to provide an aircraft to fly the Jim Croce Group from Shawnee, Oklahoma, to Columbus, Mississippi, to Natchitoches, Louisiana, and then on to Dallas. Mr. St. Martin wired Mustang the agreed upon fee ($952.63). Later that day, Mr. Breedlove learned that the aircraft he had planned to use to transport the group was disabled. He thereupon contacted John Roberts, President of Bromley Corporation, d/b/a Roberts Airways ("Roberts Airways"), who agreed to provide a Roberts Airways plane and pilot to fly the charter for Mustang.[2] Whether the group or its booking agent was ever notified that Roberts Airways had been substituted for Mustang is disputed by the parties. In any event, the Roberts Airways plane, flown by Robert N. Elliott, followed the itinerary until its fatal crash on leaving Natchitoches airport on September 20.[3]

[1] A number of other plaintiffs joined in initiating this action, but they have since settled with the defendants.

[2] Mr. Roberts testified that Roberts Airways and Mustang had a longstanding agreement that Roberts Airways would fly charters that Mustang had booked but could not fly.

[3] After the crash, Mustang paid Roberts Airways $552.35 of the sum it had received from Variety Artists.

There was some evidence presented at trial to show that the plane was not en route to Dallas, as originally scheduled, but to Sherman, Texas, apparently as a result of an agreement between the pilot and the Jim Croce Group. Moreover, the plane left Natchitoches at night, rather than on the following morning as originally planned.

The circumstances surrounding the airplane crash and the cause of the crash were hotly contested at trial. There was conflicting evidence as to whether the pilot's negligence — for example, his failure to perform a full preflight check of the aircraft or his taking off downwind into a "black hole" — or his having had a heart attack was the cause of the crash. Taking off at night, the plane was airborne only a short while before crashing. Everyone aboard the plane died instantly. Some marijuana and other controlled substances were found in the plane's debris, and a small amount of marijuana was found on the body of the plaintiffs' decedent.

Linda and Eric Cortese, decedent's wife and minor son, brought this wrongful death action against both Mustang and Roberts Airways. *See n.1, supra.* Three separate trials were held, each addressing a different question, and this appeal involves aspects of all three trials. At the first, bench trial, held in July 1976, the sole material issue was Mustang's liability for the actions of Roberts Airways. The trial judge rejected plaintiffs' theories of vicarious liability, respondeat superior, and joint venture but held Mustang liable on two alternative grounds: (1) Mustang was liable for the acts of its agent, Roberts Airways, and was estopped from denying that agency; and (2) Mustang was liable as the agent of an undisclosed principal (Roberts Airways). The court denied an interlocutory appeal. At the second trial, held in August 1977, a jury found that the pilot's failure to exercise the highest degree of care was a proximate cause of the airplane crash. In a separate order, the trial court held that "as a matter of law," the defendants were "common carriers who owed plaintiffs' decedent[] the highest standard of care." Therefore, in accordance with the jury's verdict, the court held defendants Mustang and Roberts Airways jointly and severally liable for plaintiffs' damages. The third trial, on the issue of damages, resulted in a jury verdict for plaintiffs in the following amounts: $250,000 for care, maintenance, and support; $10,000 for household services; $20,000 for love, affection, counsel, and guidance; and $20,000 for sorrow, mental anguish, or grief suffered as a result of the decedent's death.[4]

[4]The parties had stipulated that the plaintiffs would also recover funeral expenses.

Both Roberts Airways and Mustang bring this appeal, alleging numerous errors in the second and third trials. With respect to the second trial, they challenge the district court's denial of their motions for a directed verdict, a judgment n. o. v., and a new trial; its holding as a matter of law that the defendants were carriers who owed the highest degree of care to plaintiffs' decedent; its admitting certain evidence with respect to the pilot's prior conduct; and its failure to appoint a guardian ad litem to protect the interests of decedent's minor son. From the third trial, defendants appeal the court's admitting certain testimony concerning the decedent's future earnings, its refusing to give an instruction that any damages awarded by the jury would not be subject to federal income tax, and its permitting the jury to award separate damages for mental anguish and loss of love and affection. In addition, Mustang appeals the district court's holding in the first trial that it is liable for the actions of Roberts Airways. We will initially discuss the issue of Mustang's liability, as determined in the first trial, and then proceed to consider the other issues *seriatim*.

Mustang's Liability

[1] The district court concluded as a matter of law that "Mustang is estopped to deny agency because Mustang led the Croce group to believe that Robert Elliott, the pilot, was Mustang's agent, flying Mustang's airplane[,]" and that "[t]he Croce Group reasonably relied, to its detriment, on Mustang's implied promise that Mustang would fly the charter flight." Thus, it held Mustang liable for the actions of Roberts Airways and its pilot, Robert Elliott. Alternatively, the court found Mustang liable as "the agent of an undisclosed principal."[5] Mustang contends that it is not liable under either theory. We disagree. We hold that Mustang is

[5]The district court rejected plaintiffs' theories of respondeat superior, vicarious liability, and joint venture. These theories are not before us on appeal.

liable for the actions of Roberts Airways and its pilot on estoppel grounds.[6]

Mustang asserts that the district court erred in allocating the burden of proof on the estoppel theory. The following statement from the court's explanatory Memorandum and Order, issued after Mustang challenged its Findings of Fact and Conclusions of Law, provides the basis for Mustang's assertion: "Mustang was under a duty to speak. Mustang did not. The *burden* of avoidance of this breach of duty by proof that the Croce group learned from sources other than Mustang of the substitution [of Roberts Airways] *can hardly be placed upon the Croce group.*" (emphasis added).

The remainder of the Memorandum and Order, however, makes clear that the district court properly placed the burden of proving estoppel on the plaintiffs and that he was persuaded by the evidence adduced at trial that plaintiffs had carried that burden. In the margin, we quote in full the relevant portion of the Memorandum and Order.[7] This lan-

[6]Because we conclude that Mustang is liable on an estoppel theory, we need not decide whether it is liable as an agent for an undisclosed principal. However, we note that several cases suggest that the latter theory is inapposite in the instant case, since there is no evidence to show that Mustang was an agent for Roberts Airways at the time it entered into its contract with the Jim Croce Group. *See, e. g., Casey v. Sanborn's Inc.*, 478 S.W.2d 234 (Tex.Civ.App. — Houston 1972, no writ); *Vincent Murphy Chevrolet Co. v. Auto Action, Inc.*, 413 S.W.2d 474 (Tex.Civ.App.—Eastland 1967, writ ref'd n.r.e.).

[7]a) The Burden of Proof: Mustang misconceives the court's ruling. There was evidence of a custom or practice of Mustang and Roberts not to disclose a substitution of Roberts for Mustang in situations where Mustang was not able to perform a contracted for charter. Mustang booked the Croce charter and retained a substantial portion of the charter fee. One naturally inquires why the fee arrangement existed and why there was a habit and practice of such nondisclosure. The answers are common sense deductions from the evidence. Mustang enjoys enhancement of custom by being able to furnish the requested charter service. That is, Mustang avoids having to disclose to a prospective customer that it is not equipped to deliver. It thereby enjoys greater chance of future business. The ability of Mustang to retain a substantial portion of the fee is reflective of its greater ability (than Roberts) to attract business stemming in no small part from its greater size. One inference is that

guage reveals that the allegedly erroneous statement to which Mustang points concerns merely an *alternative* estoppel

Mustang has a sufficient edge over Roberts to command such a healthy (as a percentage of the total) referral fee. The Croce group contracted with Mustang thereby expressing in concrete terms their confidence both in Mustang's flying ability and presumably its financial responsibility.

Significantly, there is evidence that *Mustang* did not disclose the substitution of the smaller charter service, Roberts, and that evidence should be viewed against the background as a practice and custom of nondisclosure of such substitutions.

There are at least two difficulties with Mustang's burden of proof argument. The first is the presence of evidence of Mustang's nondisclosure. Second, Mustang proceeds upon the assumption that it had no duty to speak. In other words, Mustang argues that the deceased pilot may have told the deceased passengers or the unfortunate passengers may have otherwise learned that there had been a substitution of charter services; that the Croce burden was in any event to adduce proof to negate that possibility. Wholly apart from the direct evidence of nondisclosure, which in this court's view would directly meet the burden of proof argument, if arguendo apposite, Mustang fails to grasp the point that an estoppel can arise from a breach of a duty to speak (See Finding 4a). As stated by the Supreme Court of Texas in *Burnett v. Atteberry*, 105 Tex. 119, 145 S.W. 582 (1912):

> "An estoppel may arise as effectually from silence, where it is a duty to speak, as from words spoken. One may be induced to act to his injury on account of the silence of one interested in a transaction, and when such course of action is permitted with a knowledge of the interested party or induced by silence or tacit acquiescence, the doctrine of estoppel may be invoked. The rule is tersely but accurately stated by Mr. Bigelow in the following sentence: 'A representation in the nature of a negative of one's rights may, as we have seen, arise from pure silence, and from pure but *misleading* silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise . . .' [Emphasis the courts] . . . 'A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in decieving'." Id. *Burnett v. Atteberry*, 145 S.W. 587 (1912).

Mustang was under a duty to speak. Mustang did not. The burden of avoidance of this breach of duty by proof that the Croce group learned from sources other than Mustang of the substitution can hardly be placed upon the Croce group.
(emphasis in original).

theory, the breach of a duty to speak,[8] which was, in the court's words, "[w]holly apart from the *direct evidence* of nondisclosure, which in this court's view would *directly meet the burden of proof argument* . . . ." (emphasis added). The direct evidence was provided in large part by Richard Linden, a Mustang employee. Linden testified that he had contacted a member of the group on the road and left word that a substitute aircraft would be provided;[9] however, he also indicated that he was not likely to have informed the person that the substitute would be provided by Roberts Airways or that Mustang would no longer be responsible for the flight. The district court found, as a matter of fact, that

> there is no credible evidence that Richard C. Linden informed the Croce agent that Roberts [Airways] was the owner and operator of the substitute or that Roberts [Airways] was solely responsible for the flight, nor did anyone secure the Croce Group's agreement to the change from the original contract. While the evidence on this point is sparse, the reasonable inferences from the evidence left the court with the firm belief that no such communication occurred.

In light of Linden's testimony, this finding is not clearly erroneous. Fed.R.Civ.P.52(a). Nor is the finding that no one "in the Croce Group knew or should have known that Mustang was not responsible for the flight or that Roberts [Airways] was flying it in Mustang's place." Besides the direct evidence of nondisclosure provided by Linden, the district court relied on testimony given by the president of Roberts Airways that it was customary for Roberts Airways not to disclose to customers that they were substituting for Mustang. The inferences drawn by the trial

[8] *See Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834 (Tex. 1968). We note that the district court, "in the absence of suggestion by the parties to the contrary," looked to Texas law to resolve the agency issue before it. Its action in doing so was proper and is not contested on appeal.

[9] Mr. Linden testified that he could not recall the name of the person to whom he spoke but that the person had offered no objection to the proposed substitution.

court from this evidence are reasonable.[10] Because the factual findings detailed above fully support the district court's conclusion that the plaintiffs carried their burden of proof on the estoppel issue, we hold that Mustang is estopped from denying Roberts Airways was its agent and is liable for the acts of that agent.

Denial of Defendants' Motions for a Directed Verdict, Judgment N.O.V., and New Trial

[2] Defendants claim that there was insufficient evidence of the pilot's negligence to support a jury verdict for plaintiffs in the second trial and that the district court therefore erred in denying their motions for a directed verdict, a judgment n. o. v., and a new trial. Having thoroughly reviewed the trial transcript, we are firmly convinced that the defendants' position is without merit. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), sets out the standard by which to measure the denial of a motion for a directed verdict or for a judgment n. o. v. *Shipman* mandates that we consider *all* of the evidence in the light most favorable to the party opposed to the motion — in this instance, plantiffs. "[I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motio[n] should be denied, and the cas[e] submitted to the jury." *Id.* at 374.

[3] The evidence presented at the second trial was substantial enough to withstand the motion for a directed verdict or a judgment n. o. v. The central issue at the trial was whether the pilot's negligence was a proximate cause of the crash. Although defendants presented expert testimony to the effect that the pilot had suffered a heart attack

[10] *See* n.7, *supra*.

shortly after takeoff,[11] the plaintiffs presented evidence that was certainly sufficient to raise doubt in the mind of a reasonable juror that the pilot had suffered a heart attack.[12] Plaintiffs contended at trial that various acts of negligence on the part of the pilot, rather than a heart attack, caused

[11]Defendants presented the testimony of Dr. William J. Reals, a board-certified pathologist and professor at the University of Kansas School of Medicine, who had examined the pilot's heart after the crash at the request of the FAA. Describing at length the condition of the pilot's heart, including extensive narrowing of the arteries, Dr. Reals testified that he believed the pilot had suffered a heart attack, either "a classic coronary with pain or a cardiac arrhythmia, or a sudden cardiac arrest." He further testified that the pilot would not necessarily have been aware that he had a heart condition prior to the time of the heart attack.

Evidence was also adduced at trial that the pilot, a frequent jogger, unable to secure transportation to the airport, began jogging toward the airport, some three miles away, shortly before flight time. Eventually, he was picked up by local police, interrogated, driven to the airport, and released. In light of this evidence, Dr. Reals testified that the pilot's having jogged so soon before the flight, particularly in conjunction with the stress of takeoff, might well have contributed to the pilot's heart attack.

[12]Dr. Harry L. Gibbons, a board-certified specialist in aerospace medicine, testified for the plaintiffs that in light of the pilot's medical history and condition, the pilot would "probably" have had symptoms preceding the onslaught of a heart attack, most likely while he was jogging toward the airport. Dr. Gibbons also cited to numerous articles that cautioned against ascribing an unexplained accident to coronary disease in the pilot. As opposed to a heart attack, Dr. Gibbons proffered the theory that, based on his extensive experience, the crash was caused by the pilot's suffering a spatial disorientation as a result of his taking off into a "black hole." A "black hole," according to Dr. Gibbons, is the proper term for a black night takeoff. The jury was thus presented with a credibility choice between the parties' expert witnesses, and it was entitled to believe Dr. Gibbons rather than Dr. Reals.

Moreover, in addition to the testimony of Dr. Gibbons, the plaintiffs sought to impeach the testimony of Dr. Reals during their cross examination of him. Dr. Reals admitted on cross examination that he had twice previously noted that "the *possibility* of sudden cardiac incapacitation must be considered in evaluating the accident." (emphasis added). Dr. Reals also admitted that his examination of the pilot's heart revealed no evidence of dead heart tissue or

the crash.[13] Any one of the several negligent acts alleged,[14] if proved, would be sufficient to support a jury verdict for plaintiffs. Of these, we discuss in detail only one — the pilot's alleged spatial disorientation.

The plaintiff's expert medical witness testified at length that spatial disorientation resulting from the pilot's taking off into a "black hole" was the cause of the crash. *See* n.12, *supra*, This theory was buttressed by the testimony of Asher Vandenberg, a commercial, multiengine pilot with instrument ratings.[15] Vandenberg testified that "Natchitoches is the worst [black-out area] I have ever seen" and that a pilot taking off at night to the south "would fly into a black void." Such a takeoff, according to Vandenberg, would severely hinder a pilot's ability to tell by visual reference whether, and how far, the airplane was climbing or turning. Although other pilots testified for defendants that the deceased pilot's takeoff on the night of the crash was proper, all of the evidence on this issue, when viewed in the light

fibrosis (scarring); nor was there any evidence of "prior cardial infarct." Plaintiffs' counsel also got Dr. Reals to admit that "in all medical probability a man whose arteries had narrowed as much as the pilot's" would have had some symptoms of cardiac abnormality. Finally, plaintiffs questioned Dr. Reals about a study indicating that persons who died from sudden heart attacks had either an abnormal EKG, high blood pressure, or a history of smoking. It is undisputed that the pilot had none of these characteristics. This impeachment testimony, taken as a whole, in conjunction with the expert testimony of Dr. Gibbons, was sufficient to raise a jury question.

[13]The parties stipulated that "[p]ost-crash examination of the wreckage revealed no evidence to indicate material failure or mechanical malfunction of the aircraft prior to impact."

[14]Plaintiffs alleged, *inter alia*, that the pilot was negligent for taking off downwind into a "black hole," for failing to perform a preflight check, and for taking off when he was in an unstable mental and physical condition.

[15]Vandenberg was also an accident investigator for the Natchitoches sheriff's office. Moreover, he had landed at the Natchitoches airport only 20 minutes before the airplane crash. He was thus well qualified to discuss the particular conditions existing at Natchitoches airport on the night of the crash, as well as the more general characteristics of the airport.

most favorable to plaintiffs, *Shipman*, 411 F.2d at 374, could have led a "reasonable and fair-minded" person to conclude that the pilot was in fact negligent in taking off in the manner that he did. Given all of the evidence on plaintiff's various theories of negligence and the conflicting evidence concerning the pilot's alleged heart attack, we conclude that the trial judge rightly denied defendants' motion for a directed verdict and let the issue of the pilot's negligence go to the jury.[16] It follows that his denial of defendant's motion for a judgment n. o. v. was proper as well.

[4] With respect to the judge's denial of defendants' motion for a new trial, we are bound by an "abuse of discretion" standard. *See Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976). In light of the evidence outlined above, we find no such abuse here.

Duty of Care

[5] The district court at the August 1977 trial ruled that defendants were "common carriers who owed the plaintiff's decedent[] the highest standard of care" with regard to the flight in question. The jury found that the pilot's failure to exercise the highest degree of care was a proximate cause of the airplane crash. Defendants submit that they owed the decedent only a duty of ordinary care and that they are

[16]Plaintiffs submit that defendants' violation of certain FAA regulations was an act of negligence per se, citing *Maryland Cas. Co. v. United States*, 251 U.S. 342, 40 S.Ct. 155, 64 L. Ed. 297 (1920), and *United States v. Schultetus*, 277 F.2d 322 (5th Cir.), *cert. denied*, 364 U.S. 828, 81 S.Ct. 67, 5 L.Ed.2d 56 (1960). Both of those cases state that government regulations have the "force and effect of law," but neither case concerns a violation of a governmental regulation by a defendant or addresses the issue of negligence per se. *Maryland Casualty* dealt with the *government's* failure to take into account its own regulations in rejecting a taxpayer's claimed deductions, while *Schultetus* concerned a *judge's* error in failing to apply certain regulations. However, because we find that there was ample evidence to support the district court's denial of defendants' motions, we need not decide whether defendants' violation of the FAA regulations constituted negligence per se.

therefore entitled to a judgment in their favor in light of the additional jury finding that the pilot's failure to exercise ordinary care was not a proximate cause of the crash.

Defendants concede that a common carrier ordinarily owes one who is a "passenger" the highest duty of care. However, they argue that the decedent lost his status as a "passenger" by carrying marijuana aboard the airplane and thereby became a mere licensee, invitee, or trespasser to whom they owed only a duty of ordinary care.[17] Evidence adduced at trial showed that the decedent was carrying a small amount of marijuana[18] on his person. The thrust of defendants' argument is that their contract of carriage with the decedent is void because it had an illegal purpose: to transport the marijuana.

We find defendants' contention on this point to be specious. The purpose of the contract between the defendants and the decedent was to transport the decedent and the

[17]Plaintiffs contend that defendants have stipulated that the decedent and other members of the Jim Croce Group were "passengers" and cannot be heard to argue that the decedent was merely a licensee, invitee, or trespasser. However, that stipulation was made only for the purposes of the July 1976 trial in which Mustang's vicarious liability was the sole material issue. We can give no weight to this stipulation in determining the duty of care owed by defendants to plaintiffs' decedent.

[18]According to a criminalistics laboratory report, a plastic bag containing "green vegetable matter" and "foil with green substance" was found on the body of the deceased. After laboratory analysis, the "green vegetable matter" was determined to contain marijuana, and the "green substance" was determined to contain marijuana extract.

Marijuana, hashish, and a variety of other drugs were found on the bodies and in the luggage of other members of the Jim Croce Group, and other controlled substances were found in the aircraft. These additional drugs have no bearing on our decision today. We are presented only with the question of the duty of care owed by defendants to decedent, not to other occupants of the plane or to the Jim Croce Group. There was no evidence adduced at trial to show that these other drugs were the property of the decedent. Thus, only the small amount of marijuana that was found on decedent's body is relevant to our resolution of this issue.

other members of the Jim Croce Group, not to transport marijuana. The policy underlying the requirement that a common carrier exercise the highest degree of care is to ensure that it provide safe transportation to those who contract for the use of its services. We agree with the plaintiffs that a common carrier should not be entitled to avoid the high standard of care it owed its passengers "because of some unknown or undisclosed conduct of the passenger, *merely incidential to the trip*, that happen[s] to be in violation of a statute or regulation."[19] (emphasis added). It makes no sense to say that a common carrier owes a lesser duty of care to a traveler who is carrying a marijuana cigarette or two in his pocket[20] than to a "passenger" seated nearby who is not. Defendants' counsel admitted as much at oral argument,[21] and agreed that a passenger traveling with one marijuana cigarette on his person could not be said to be traveling with the intent to transport it. An airline passenger may be subject to other penalties for transporting a small amount of marijuana in violation of state or federal laws, but he is still entitled to the assurance that a carrier will exercise the utmost degree of care in order to insure his safety. In essence, decedent's carrying a small amount of marijuana aboard the airplane is immaterial for the purpose of determining the degree of care that a common carrier owes its "passengers."

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[19]Moreover, if a carrier's duty to a person onboard an aircraft is determined by whether that person is committing some infraction of a state law, then the duty of care owed to a single individual might well vary in the course of a single interstate or transcontinental flight, as the aircraft passed across state boundaries. We cannot subscribe to such an unpredictable means of determining carrier responsibility to persons onboard its aircraft. Passenger safety is the paramount consideration, and in the absence of a contract for an illegal purpose or of disruptive conduct on the part of the "passenger," *see Williams v. Shreveport Yellow Cab Co.*, 183 So. 120 (La.App.1938), which interferes with the carriage, the standard establishing the highest degree of care must prevail.

[20]*See* n.18, *supra.*

[21]In response to a question from the bench that posited this thesis, defendants' counsel replied: "If it's one marijuana cigarette in the man's coat jacket, I think you'd have a good point."

Evidence of Pilot's Prior Conduct

[6] Defendants argue that the district court erred in admitting evidence of the pilot's past conduct to prove that he acted in conformity with that conduct on the evening of the accident in violation of Fed.R.Evid. 404.[22] The trial transcript makes clear, however, that the judge permitted this evidence to be introduced not for the purpose proscribed by Rule 404 but for the limited purpose of rebutting certain opinions given by defendants' experts concerning the pilot's previous deportment as a pilot.[23] We agree with the district

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[22](a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609;

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[23]In his final charge, the judge explained to the jury that he was admitting "evidence of the prior accidents experienced by Robert N. Elliott not because they have any bearing on the cause of the crash now in question but to avoid your possibly concluding [by inference from defendants' experts' testimony] that no such incidents had occurred." He had previously cautioned the jury on a number of occasions that the evidence was being admitted for this limited purpose only.

court, whose ruling is set out in the margin,[24] that the admission of the evidence for this circumscribed purpose was

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[24]I want the record to reflect in the Pre-Trial Order it's recited in it Robert N. Elliott held an Airline Transportation Pilot Certificate No. 37153 with airplane single and multi engine ratings, together with a Certified Flight Instructor's Rating, and a current medical certificate. Despite the fact that it was so stipulated the Defendants have repeatedly referred to these certifications in differing factual contexts to communicate to the Jury that Robert N. Elliott was a safe and careful pilot.

In the opening statement of the Counsel, both defense Counsel specifically told the Jury that they intended to show that the pilot was extremely capable, experienced and in general possessed traits of being a safe pilot.

During the trial, despite the warnings of the Court that the defense Counsel were attempting to place the general reputation of the pilot in issue, the defense Counsel have persisted and the Defendants have asked hypothetical questions of the expert witness now on the stand and others as to the cause of the accident, which assumes for the purposes of expressing the opinion that Robert Elliott was experienced by virtue of his large number of hours and in general possessed traits of being a safe pilot and in general he was a pilot competent of good judgment.

In sum, the Defendants have calculatedly placed in evidence opinion evidence that Robert Elliott was a safe pilot and that because of his total hours and certifications adhered to such safe practices all leading to the conclusion hoped for by Defendants that he was unlikely to have made a mistake on this take-off.

Now, seems to me this character of evidence as to the reputation or opinion of Robert Elliott as a safe pilot is not proper evidence that Elliott adhered to safe practices at the time of the accident. At the same time where the Defendants have, despite the admoniions of the Court, and under circumstances which eliminate any possibility of inadvertence, elicited testimony which is no more than or no less than opinions as to Robert Elliott's traits and judgments that adheres to safe practices of the pilot.

The Plaintiffs must be able to resist under Rule 405. The Court is sensitive to the distinction between matters of habit and custom and general reputation. The Court has labored to avoid receipt in evidence of prior specific acts of this pilot but in the posture of the case, which is a direct result of the efforts of the Defense Counsel to not allow this Jury to learn of this pilot's record, will not avoid potential prejudice but would affirmatively mislead them particularly in the factual context of this case.

entirely proper.[25] Moreover, since the defendants themselves, despite repeated warnings by the trial court, "place[d] the general reputation of the pilot in issue, *see* n.24, *supra*, they cannot now be heard to complain of the district court's error, if any, in admitting this evidence. *See United States v. Spiegel*, 604 F.2d 961, 966 (5th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 2151, 64 L.Ed2d —— (1980).

Failure to Appoint Guardian Ad Litem

[7] Defendants submit that the court's failure to appoint a guardian ad litem pursuant to Fed.R.Civ.P. 17(c) constituted reversible error. We disagree. Rule 17(c) authorizes the district court to appoint a guardian ad litem "for an infant . . . *not otherwise represented* in an action . . . ." *Id.* (emphasis added). In the instant case the infant was "otherwise represented"; the child's legal guardian, his mother, brought this action on his behalf. Thus, there was no need for the court to appoint a guardian ad litem.

The record of Robert N. Elliott should have remained a neutral circumstance but Defendants chose not to leave it in this posture, that is to say that Defendants could not have informed the Jury of Robert N. Elliott's background, including his certifications, but Defendants by no means confined themselves to such information.

For all those reasons, and for the reasons which the Court will articulate after the verdict, the Plaintiff will be allowed hereafter to cross examine with regard to the prior record of Mr. Elliott and its effect upon the opinions of the witnesses and to offer into evidence affirmatively his record.

[25] *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969), is not to the contrary. In *American Airlines* we articulated "the rule that evidence of a similar act of negligence is not admissible to prove negligence in performing the same act later." *Id.* at 197 (citations omitted). We nevertheless held the evidence at issue to be admissible because it was presented in support of another theory. *Id.* In this case evidence of the pilot's prior conduct was not presented to prove he was acting in conformity with a previous negligent act; it was therefore properly admitted under the *American Airlines* rationale.

Defendants nevertheless contend that the trial court erred in failing to even "consider the question of whether a guardian ad litem should have been appointed to represent the minor Plaintiff."[26] For this proposition, they cite *Roberts v. Ohio Casualty Insurance Co.*, 256 F.2d 35 (5th Cir. 1958). *Roberts*, however, is clearly distinguishable: in *Roberts* the children's mother was not a party to the cause of action, and neither she nor any other legal representative pressed the children's interests until after a judgment was entered against them; in the instant case, to the contrary, the child's mother and legal guardian was a party to the lawsuit below and vigorously pressed her child's claims before the trial court. The defendants here have demonstrated absolutely no conflict between Mrs. Cortese's interests and those of her son, nor have they shown any prejudice to the child's interests.[27] We discern no error on the part of the trial court on this issue.

Evidence of Decedent's Future Earnings

[8, 9] Defendants further contend that the district court erred in admitting the testimony of Allen Neuman, a former employee of the organization by which the decedent was employed, and the testimony of decedent's wife concerning the decedent's future earnings because such testimony was speculative and conjectural in nature.[28] In their view, Louisiana law prohibits the consideration of such evidence in awarding damages for the loss of future earnings. How-

[26]In this regard, defendants point out that plaintiffs presented no proof of guardianship until the time of this appeal.

[27]Nor, of course, have they shown any prejudice to themselves.

[28]For the sake of clarity, we first outline below certain background information so as to provide a context within which the challenged testimony can be viewed.

From September 1972 until his death, plaintiff's decedent was a road manager for Variety Theatre International, Inc. ("Variety Theatre"), an organization that booked and produced concerts for colleges throughout the United States. At the time of the fatal accident, he was managing the tour of the Jim Croce Group. For his services the decedent was paid $700 per month, plus a yearly bonus of $400-500. In addition, all of his tour-related expenses were paid while he was on tour.

ever, Louisiana law does not control the issue of whether this evidence should have been admitted in a federal district

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In July 1974, the president of Variety Theatre sold the corporation to his associates, who put up $15,000 apiece (except for one who put up $30,000). The new organization, named Variety Artists International, Inc. ("Variety Artists"), was identical to Variety Theatre except that each of the purchasers became an officer of the new corporation, and the former president was removed. Otherwise, all of Variety Theatre's employees were retained by Variety Artists.

Against this factual background, we recount the testimony to which the defendants object. Allen Neuman, a former road manager for Variety Theatre, testified that he had been trained for that position by the decedent. He disclosed that in September 1973, at the time of the airplane crash, his salary was $600 per month. Mr. Neuman testified that in July 1974, at the time of the corporate changeover, he had borrowed $15,000 from a bank in order to buy into Variety Artists; his salary at that time was approximately $12,000 annually. By his calculations, his salary had risen to $16,000 annually by July 1976. Mr. Neuman revealed that he had become a booking agent in November 1974. On the basis of his experience as a booking agent, he averred that the decedent would have been a good salesman and would still have been employed by Variety Artists. Defendants complain of the admission of Mr. Neuman's testimony as a "yardstick" by which to measure the decedent's future earnings.

Defendants also object to certain testimony given by decedent's wife to the effect that her parents had the means to extend a $15,000 loan to the decedent so that he could have purchased a share in Variety Artists had the opportunity presented itself. After a lengthy discussion outside the presence of the jury, the court allowed this testimony in, ruling that her parents' ability to make a loan was a question of fact for the jury. Defendants also raise on appeal the admissibility of her testimony that the decedent had wanted to become a booking agent for Variety Artists.

Curiously, defendants do not object to the admission of the testimony of Lloyd St. Martin, former office manager and travel coordinator of Variety Theatre and an officer of Variety Artists. Mr. St. Martin testified that decedent was likely to have become a booking agent or salesman for Variety Artists at a substantially higher salary had he survived. Like Mr. Neuman, Mr. St. Martin had bought into Variety Artists. When Mr. St. Martin was asked if he would have to assume that the decedent had "$15,000 he could have put up to buy into Variety Artists," Mr. St. Martin responded that the decedent "would probably have done what everyone else did" — buy into the new corporation.

court;[29] Fed.R.Evid. 403[30] provides the proper standard. Evaluated by that standard, the testimony concerning decedent's future earnings, albeit speculative and conjectural, was properly admitted. Because Louisiana law permits plaintiffs in a wrongful death action to recover for loss of support, which is equivalent to the loss of future earnings, *see Viator v. Gilbert*, 253 La. 81, 216 So.2d 821, 822 (1968), the testimony was certainly relevant to the issue of damages. Moreover, we are not convinced that the probative value of the evidence was outweighed by the danger of unfair prejudice. The speculative nature of the evidence affects only the *weight* of the evidence and was therefore properly before the jury.

Damages for Mental Anguish and Loss of Affection

[10] Defendants complain that the trial court erred in allowing the jury to award $20,000 for loss of "love, affection, counsel, and guidance" and an additional $20,000 for "sorrow, mental anguish, or grief suffered as a result of his [Kenneth Dominick Cortese's] death".[31] We agree with

[29]Although we need not decide whether the evidence at issue here would be admissible in a Louisiana court, we note here several cases suggesting that conjectural evidence concerning future earnings would be admissible. *See Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151, 154-55 (1971); *Viator v. Gilbert*, 253 La. 81, 216 So.2d 821, 822-23 (1968).

[30]Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[31]The judge submitted the following special issue to the jury. The jury's answers are indicated in the appropriate spaces.

> What amount of money, if any, if now paid in cash do you find from a preponderance of the evidence would fairly and reasonably compensate Linda and Eric Cortese for their pecuniary loss resulting from the death of Kenneth Dominick Cortese?
>
> In answering the question inquiring into what sum of money if now paid in cash, you should keep in mind that money in hand is more valuable than money received at a later date. Accordingly,

defendants that Louisiana law[32] does not sanction such "double recovery."

Louisiana's wrongful death statute provides in pertinent part that "[t]he survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the decreased." La.Civ. Code Ann. art. 2315 (West 1979). The statute, by its terms, does not restrict the elements to be considered in assessing damages, and we have previously noted that "Louisiana courts recognize as proper elements of damages [for wrongful death] not only loss of support, loss of contributions, from the decedent, but also loss of society and the grief and anguish of the beneficiaries." *Silverman v. Travelers Insurance* Co., 277 F.2d 257, 261 (5th Cir. 1960) (footnote omitted).[33] However, no case to which we have been referred stands for the proposition that plaintiffs in a wrongful death

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you should apply a discount factor in accordance with the evidence in arriving at the sum to be awarded.

In connection with this question, you may consider the following elements: (a) care, maintenance, and support; (b) household services; (c) love, affection, counsel, and guidance; and (d) sorrow, mental anguish, or grief suffered as a result of his death.

Answer in dollars and cents, if any, as to each:

Linda and Eric Cortese:

(a) care, maintenance, and support	$250,000.00
(b) household services	$10,000.000
(c) love, affection, counsel, and guidance	$ 20,000.00
(d) sorrow, mental anguish, or grief suffered as a result of his death	$ 20,000.00

(burden of proof on plaintiffs)

[32]The district court correctly held that Louisiana's wrongful death statute, La.Civ.Code Ann. art. 2315 (West 1979), applied. *See Gutierrez v. Collins*, 583 S.W.2d 312, 315 (Tex.1979); *Marmon v. Mustang Aviation*, 430 S.W.2d 182 (Tex. 1968).

[33]*Cf. Dobyns v. Yazoo & M. V. R.* Co., 119 La. 72, 43 So. 934 (1907) (permitting recovery for loss of love and affection); *Cambrice v. Fern Supply Co.*, 285 So.2d 863, 866 n.5 (La.App. 1973) (allowing compensation for mental suffering by surviving relative if he is not deprived by a higher-ranked survivor).

action can recover *separate* monetary awards for loss of love and affection on the one hand and for sorrow and mental anguish on the other.

Blancher v. Samuels, 354 So.2d 213 (La.App.) (on reargument), *writs denied*, 355 So.2d 257, 263 (La. 1978), cited by plaintiffs, acknowledges that damages for wrongful death "include not only loss of support, but also loss of the love and affection of the decedent and the grief and anguish of the survivor," *id.* at 223, but it does not support their contention that separate awards were proper in the instant case. In fact, *Blancher* cuts against, rather than in favor of, plaintiffs' contention. The special interrogatory on damages[34] that the judge in *Blancher* submitted to the jury required the jury to fix a single dollar figure to compensate the plaintiff for *both* loss of love and affection *and* grief and mental anguish.[35] *Blancher* thus cannot be read to support the duplicative recovery permitted in the instant case.

Absent a clear expression from the Louisiana courts favoring separate monetary awards for distinct elements of nonpecuniary damages,[36] we decline to authorize separate awards here. Our caution is dictated at least in part by a fear that a contrary decision could result in further "fragmentizing" of awards for nonpecuniary losses in future cases. Moreover, our refusal to award separate damages gains

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[34]10. What sum of money, paid in cash today, would fairly compensate Mrs. Nancy Nuebel Blancher for the death of her husband in each of the following respects:

(c) The amount to reasonably reimburse her for the loss of her husband's love and affection and the grief and mental anguish she may have sustained and might reasonably continue to sustain as a result thereof . . . .

354 So.2d at 222-23.

[35]The court in *Blancher* held that the jury had erred "as a matter of law in refusing to fix any [damages] at all when the facts show entitlement to some amount." 354 So.2d at 223.

[36]*Cf. Marceleno v. State Department of Highways*, 367 So.2d 882, 889 (La.App. 1978) (contrasting nonpecuniary loss with pecuniary loss), *writ ref'd* 369 So.2d 1364 (La. 1979).

support from 3 Stone, *Louisiana Civil Law Treatise* § 26 at 32 (1977) (emphasis added):

> The question whether a survivor could in addition recover damages under the action for wrongful death for distress and mental suffering occasioned by the death is more difficult. In *Dobyns v. Yazoo & M. V. R. Co.*,[83]

Insofar as the district court allowed plaintiffs to recover separately for loss of affection and mental anguish, its judgment is reversed. Plaintiffs are entitled to recover a total of $20,000 for their nonpecuniary losses.

Failure to Give Instruction

[11] Defendants next contend that the trial judge erred in refusing to instruct the jury, as they had requested,[37] that any damages the jury awarded to the plaintiffs would not be subject to federal income taxation. In their brief, defendants observed that "the propriety of an instruction as

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[83]119 La. 72, 82, 43 So. 934 (1907).
the Supreme Court referred to "distress and mental suffering" of the plaintiff but such was due to the "deprivation of her husband's companionship" and so it can be argued that these were merely ways of describing loss of companionship. In *Bourg v. Brownell-Drews Lumber Co.*[84] the

[84]120 La. 1009, 45 So. 972 (1908).

court took into consideration "the mental suffering and deprivation caused to a parent by the death" but again the use of the word "deprivation" could indicate that what was here referred to was loss of affection, companionship etc. The better opinion would seem to be that Judge Monroe in these cases was *not creating a separate category of recoverable damage but was merely describing that damage which was included under the heading of loss of society and companionship.*

[87]I charge you as a matter of law, that any award made to the plaintiffs in this case, if any is made, is not income to the plaintiffs within the meaning of the federal income tax law. Should you find the plaintiffs are entitled to an award of damages, then you are to follow the instructions already given you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of federal income taxes.

to the effect of federal income tax law upon the issues [related to damages] is a matter of the proper application of Louisiana law" and proceeded to argue on the basis of Louisiana case law that the trial court's refusal to give their requested instruction constitutes reversible error. At oral argument, however, defendants relied not on Louisiana law but on *Norfolk & Western Railway Co. v. Liepelt*, —— U.S. ——, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), decided by the Supreme Court after the submission of briefs in this case, for the proposition that the district court was required to give their requested instruction.

We cannot agree with the defendants that *Liepelt* controls our disposition of this issue; for reasons explained below, we look to state law to determine whether the instruction was required, as defendants contended in their brief. Our reading of the Louisiana cases, unlike defendants', indicates that a trial judge's refusal to give the requested instruction would *not* constitute reversible error in Louisiana. Accordingly, the district judge's refusal to give the instruction was proper.

In *Liepelt* the administratrix of a fireman's estate brought suit under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, for damages that his survivors suffered as a result of his death. At trial an expert witness testified for plaintiffs that they had suffered damages in the amount of $302,000.[38] An expert witness for defendant sought to testify that the decedent's federal income taxes for the years 1973 through 2000 would have amounted to $57,000. Taking this figure into account and using different

[38]The witness arrived at this figure by taking the decedent's expected gross earnings, adding the value of services he would have rendered to his family, subtracting the amounts that the decedent would have spent on himself, and then discounting the total to its present value at the time of trial.

assumptions about decedent's future salary and the calculation of the present value of future earnings, defendant's expert estimated plaintiff's net pecuniary loss to be $138,327. The trial court, however, refused to allow evidence of the decedent's future taxes into evidence and also refused to instruct the jury on the nontaxability of a damage award as requested by defendant. The jury returned a verdict of $775,000. After Illinois appellate courts affirmed, the Supreme Court reversed, holding that the lower court erred both in refusing to admit the evidence and in refusing to give the requested instruction.

We are convinced that *Liepelt* does not control our decision here. The wrongful death action in *Liepelt* arose under the FELA and not under a state statute, as the instant case did. In our view, this distinction is crucial. In discussing the issue of whether federal or state law governed the propriety of the court's refusal to give the instruction in *Liepelt*, the Supreme Court specifically acknowledged the federal nature of suits brought pursuant to the FELA:

> Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that *questions concerning the measure of damages in an FELA action are federal in character.* See, *e. g.*, *Michgian Cent. R. Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417. This is true even if the action is brought in state court. See, *e. g.*, *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117.[5]

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[5]One of the purposes of the Federal Employer's Liability Act was to *"create uniformity throughout the Union"* with respect to railroads' financial responsibility for injuries to their employees. H.R.Rep.No. 1386, 60th Cong., 1st Sess., p. 3 (1908). See also *Dice v. Akron, Canton and Youngstown R. Co.*, 342 U.S 359, 362, 72 S.Ct. 312, 314, 96 L.Ed. 398; *Brady v. Southern Railway*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239; Hill, Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956).

Id. 100 S.Ct. at 757 and n.5 (emphasis added). In the instant case federal concerns are lacking; this wrongful death action is a statutory creation of the state, and the measure of damages to be recovered, as we noted above, *see* n.32, *supra*, is governed by state law. Nor is the need for uniformity throughout the United States, which was "[o]ne of the purposes of the Federal Employer's Liability Act," *id.*, 100 S.Ct. at 757 n.5, implicated in a cause of action brought to vindicate a state-created right. Despite some broad language approving an instruction that informs the jury that an award of damages will not be subject to income tax, *see id.* 100 S.Ct. at 759, there is no suggestion that the Supreme Court in *Liepelt* intended to *require* a trial judge to give such an instruction in wrongful death actions predicated upon state statutes.[39]

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[39]The dissent, in fact, explicitly recognizes that state law governs questions such as the one raised here unless the state law contravenes federal policies:

> This Court, to be sure, has asserted federal control over a number of incidents of state trial practice that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. See, e. g., *Brown v. Western R. of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949) (a State cannot apply, in a FELA case, its usual rule that pleadings are construed against the pleader); *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule); C. Wright, Law of Federal Courts 195-196 (3d ed. 1976); Hill, Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956). I agree, of course, that state rules that interfere with federal policy are to be rejected, even if they might be characterized as "procedural." See, e. g., Note, State Enforcement of Federally Created Rights, 73 Harv.L. Rev. 1551, 1560-1561 (1960). See generally Note, Procedural Protection for Federal Rights in State Courts, 30 U.Cin.L.Rev. 184 (1961). I cannot conclude, however, that a purely cautionary instruction to the jury not to misbehave implicates any federal interest. This issue truly can be characterized as one of the "ordinary incidents of state procedure." *Dickinson v. Stiles*, 246 U.S. 631, 633, 38 S.Ct. 415, 416, L.Ed. 908 (1918), which should be governed by state law.

100 S.Ct. at 762-63 (Blackmun, J., dissenting).

Moreover, the jury in *Liepelt* awarded the plaintiffs $775,000, far in excess of the estimation of the plaintiff's pecuniary loss ($302,000) made by their own expert witness. The Court, noting this discrepancy, opined: "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore *it improperly inflated the recovery*." Id. 100 S.Ct. at 759 (emphasis added). At the trial below on the issue of damages, there was no inflation of the recovery beyond the amounts testified to by the expert witnesses. We thus have no reason to suppose, as the Court in *Liepelt* did, that the jury labored under the misconception that federal taxes would be imposed.

Having determined that *Liepelt* does not control the outcome of this issue, we turn to Louisiana case law to ascertain whether the refusal to give the requested instruction constitutes error in Louisiana.[40] We conclude that it does not. In *Guerra v. Young Construction Co.*, 165 So.2d 882 (La.App.), *writ ref'd.* 246 La. 864, 167 So.2d 676 (1964), the court held that a refusal to give a similar instruction was not error.[41] The defendants mistakenly contend that *DeBose v. Trapani*, 295 So.2d 72 (La.App.), *writ ref'd*, 299 So.2d 359 (La. 1974), repudiated the holding of *Guerra*. *See also Francis v. Government Employers Insurance Co.*, 376 So.2d 609 (La.App. 1979), *writ ref'd*, 378 So.2d 1391 (La. 1980). In *DeBose* the trial court had in fact *given* the requested instruction; the appellate court merely held that the trial

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[40]Whether giving the instruction is desirable as a matter of policy is not the question before us; we need decide only whether the *refusal* to instruct requires us to reverse and remand this case for a new trial.

[41]Charge No. 5 sought to instruct the jury not to add any amount to the actual damages any sum designed to offset income tax on the recovery, since the recovery is non-taxable. The judge instructed the jury properly as to the compensatory nature of damages, and specifically listed nine items which the jury might consider. Refusal to give the charge requested by defendants was not error. See 15 Am.Jur. Damages Sec. 369.

Id. at 887.

judge had not erred in doing so. 295 So.2d at 74-75. *Cf. Francis*, 376 So.2d at 612 (following *DeBose*). The court in *DeBose* was simply not confronted with the issue presented in *Guerra* and in the instant case. In the absence of contrary authority,[42] we follow the mandate of *Guerra* in upholding the district court's refusal to give the instruction.

Conclusion

For the reasons stated above, we affirm the district court's imposition of joint and several liability on Mustang and Roberts Airways for plaintiffs' damages, as modified herein.

AFFIRMED in part and REVERSED in part.

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[42] *Reeves v. La. & Ark. Ry. Co.*, 304 So.2d 370 (La.App.), *writ ref'd*, 305 So.2d 123 (La. 1974), did not involve jury instructions and is not apposite here.

H-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 78-2627

INGRID CROCE, Administratrix of the Estate of
JAMES JOSEPH CROCE, Etc., ET. AL.,
Plaintiffs,

LINDA CORTESE, ET. AL.,
Plaintiffs,

versus

BROMLEY CORPORATION, doing business as
ROBERT AIRWAYS AND MUSTANG AVIATION, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(October 14, 1980)

Before AINSWORTH AND GEE, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

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*District Judge of the Western District of Louisiana, sitting by designation.